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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1332

WILLIAM M. CHANEY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

The petitioner, William M. Chaney, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Michigan rendered in these proceedings on the 3rd day of December, 1973. See Appendix A.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Michigan appears as Appendix A, p. A1.

The opinion of the Michigan Court of Appeals, Division 2, appears as Appendix B, pp. A2-A3.

JURISDICTION.

The opinion of the Supreme Court of the State of Michigan was rendered on the 3rd day of December, 1973.

Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTION INVOLVED.

Does the search of an automobile which has been stopped by state police pursuant to a police radio bulletin put on the air as a result of a tip given by an informer to a state police officer who did not know the informer, who had never dealt with the informer before, who did not know how or from where the informer obtained his information and who knew nothing of the informer's reliability until after the bulletin was put on the air and which tip did not directly show criminal activity, violate the 14th Amendment of the Constitution of the United States?

ARTICLES OF CONSTITUTION INVOLVED.

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

STATEMENT OF THE CASE.

On August 16, 1969, Detective Sergeant Schwartzkopf of the Michigan State Police, on standby duty at his home, received a call from his superior informing him that he would be receiving a telephone call from an informant with some unexplained information (District Court Transcript, pp. 11 and 12). On that same day the sergeant did receive such a call informing him that a late model Chevrolet, black and white with Indiana license 98 W 51, was travelling from Hammond to Flint with one or possibly three persons in it and that William Chaney, the defendant, would be in the car and "may be armed". (District Court Transcript, p. 12.)

At the time he received the telephoned tip the sergeant did not know the informer, had never dealt with him before, did not know how or from where the informer obtained his informa-

tion and knew nothing about the reliability of the informer. (District Court Transcript, p. 16)

As a result of this information the sergeant caused a police radio broadcast to watch for and stop this car to be put on the air. (District Court Transcript, p. 16)

A Michigan state trooper in a police vehicle while in the process of following and timing another speeding vehicle, spotted the described automobile, abandoned his timing of the other car and followed the described car. He radioed to his post that he had the car spotted and was advised not to stop it alone but to wait for help. (District Court Transcript, p. 22) Three other troopers were radioed to his aid and upon their arrival the car was stopped. The occupants were ordered out at gun point and exited the car with hands up. (District Court Transcript, p. 44) No weapons were in plain sight in the car (District Court Transcript, p. 44) but the car was searched and the weapon and the gas ejection devise in question were found. The defendant and other occupants of the car were then taken to Ypsilanti State Police Post where a speeding ticket was supposedly issued although the automobile, while allegedly doing 80 miles per hour in a 70-mile per hour speed zone, was not stopped for speeding. (District Court Transcript, p. 47) Actually, no ticket for speeding was ever issued, no speeding charges were filed, and no one was ever tried by court for the supposed speeding offense.

On August 18, 1968, a warrant was issued against the appellant for illegal possession of a firearm in an automobile and for illegal possession of a gas ejection devise. Thereafter an examination was held in the District Court for the 14th District, Ann Arbor, Michigan, at which appellant raised the issue of illegal search and seizure and appellant was bound over for trial in Circuit Court.

On January 22, 1972, two informations were filed against appellant Chaney charging him with the unlawful possession of a gas ejection device, and another charging him with the unlaw-

ful possession of firearm in an automobile. Appellant filed his motion to quash the information based on the illegal search and seizure which was denied. Appellant then filed his motion to suppress out of evidence the firearm and the gas ejection device found in the automobile as a result of the warrantless search. This was also denied. Appellant was tried by jury and convicted of the charges in each information. His timely filed motion for new trial based upon the admission into evidence of fruits of the search and seizure was denied. He filed a claim of appeal in the Michigan Court of Appeals based upon the illegal search of the car and the Michigan Court of Appeals affirmed the conviction finding the search to have been made in the course of an arrest for speeding. Defendant thereafter filed application with the Supreme Court of Michigan for leave to appeal which, on December 3, 1973, was denied.

ARGUMENT.

The search of appellant's automobile and the resulting seizures complained of herein came about by reason of an informer's tip and the constitutionality of such search and seizure is therefore to be tested against the standards set up by *Aguilar* v. *Texas*, 378 U. S. 108, as subsequently modified by *Spinelli* v. *United States*, 393 U. S. 410, and *United States* v. *Harris*, 91 S. Ct. 2075.

Aguilar sets forth two criteria which must be met before information supplied by an informer can be used to obtain a search warrant. First, there must be some showing that the informer is reliable. *Harris* apparently somewhat relaxed this test by holding that the reliability of the informer need not be specifically alleged but that such reliability can be supplied by other facts, *i.e.*, that the officer knew the informer, that the officer had previously dealt with the informer, that the officer had independent knowledge of the act, or that the information given was against the interest of the informer.

However, in the search and seizure involved herein there is a complete absence of any showing of reliability of the informer and also an absolute absence of other facts which could supply such missing reliability. Sergeant Schwartzkopf, the Michigan State Police officer who received the tip, testified that he never knew the informer,[1] had never dealt with him before,[2] and knew nothing about his reliability until after he had received the information and caused the radio bulletin to be issued.[3] He further testified that he had no independent facts or knowledge of his own concerning the information,[4] and that he did not know how or from where the informer obtained this information.[5] Therefore the search and seizure herein questioned utterly failed to meet the first *Aguilar* test and must therefore be found unconstitutional.

However not only does this search and seizure fail to meet *Aguilar's* first criterion, but also it wholly fails to meet *Aguilar's* second criterion. *Aguilar* held that not only must there be some showing of the informer's reliability but also there must be some showing of the source of the informer's information, and *Spinelli* added a supplemental rule to this requirement. The Court there said:

> "In the absence of a statement detailing the manner in which the information was gathered it is especially important that the tip describe the accused criminal activity in sufficient detail that the magistrate may know he is relying on something more substantial than a casual rumor or an accusation based upon an individual's general reputation."

Here Sergeant Scwahrtzkopf, the officer receiving the tip, stated he did not know and was not informed as to how or from

1. District Court Transcript, p. 8, l. 5.
2. District Court Transcript, p. 8, l. 5; ll. 12-15.
3. District Court Transcript, p. 9, l. 10; p. 10, l. 13; p. 19, ll. 4-9.
4. District Court Transcript, p. 11, ll. 16-21; p. 12, ll. 7-13.
5. District Court Transcript, p. 16, ll. 1-3.

where the informer obtained his information.[6] There is therefore an absence of information as to the source of informer's information. And, when measured against the *Spinelli* supplemental rule, this search and seizure fails to meet the requirements of that rule but rather actually falls into the situations warned against in *Spinelli*, for here the informer's tip is based upon the general character of the appellant. In response to a question asked of him as to information he received from the informer concerning how the occupants of the car would be armed, Sergeant Schwartzkopf replied:

> "Uh, I do believe that there was mention that a hand gun would be involved. In fact, when he mentioned guns, I think I asked him what kind, and he said hand guns. And I was told that Chaney carried a gun on his person, as well as one in his vehicle too. And nothing further was said."[7]

Stated in other words, the tip received by the sergeant was that appellant and perhaps others, travelling across Michigan in a late model Chevrolet, may be armed because appellant was known to carry a gun on his person and in his automobile.

This is nothing more than a tip based upon appellant's general reputation, precisely what this Court in *Spinelli* stated would not be sufficient!

Further, in this case no evidence of any criminal activity was given. The tip merely gave information of certain facts which in and of themselves did not constitute a criminal activity—that occupants of the car *may* be armed. The carrying of weapons in a car is not *per se* illegal. It is only when such weapons are carried in the automobile without a license to so do that the act becomes illegal.[8] There, there was no information

6. District Court Transcript, p. 16, ll. 1-3.

7. District Court Transcript, p. 15, ll. 5-12.

8. Michigan Statutes Annotated, Section 28-424:
Any person who shall carry a dagger, dirk, stiletto or other dangerous weapon except hunting knives, adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by

given as to whether or not the occupants of the car had a license to carry the guns.[9] There was no showing that the guns were being carried for an illegal purpose.[10] At the time the sergeant issued the radio bulletin he had no knowledge of any criminal activities on the part of appellant or any other occupant of the car.[11]

Not only did the tip give no information of criminal activity, but also some of the information given was erroneous.

For although the tip stated appellant may be armed, the appellant when searched was found to be carrying no weapons on his person,[12] nor was appellant driving the auto as the tip had stated he would be,[13] and the appellant was not alone nor were there just two other persons travelling in the car with him. There were in fact four persons in the car, appellant and three others.[14]

Neither did the tip give specific and certain information[14a] and it also failed to give much information which might give

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him, except in his dwelling house or place of business or on other land possessed by him; and any person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in any vehicle operated, or occupied by him, except in his dwelling house or place of business or on other land possessed by him, without a license to so carry said pistol as provided by law, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five (5) years, or by fine of not more than two thousand five hundred ($2,500) dollars.

9. District Court Transcript, p. 16, ll. 4-16.

10. District Court Transcript, p. 16, ll. 21-24; p. 17, ll. 1-19.

11. District Court Transcript, p. 16, ll. 4-16; informant gave no information as to whether or not appellant had a permit to carry the gun, District Court Transcript, p. 16, l. 21 through p. 17, l. 11—no information as to the purpose of appellant in coming into Michigan.

12. District Court Transcript, p. 44, l. 17; p. 45, l. 13.

13. District Court Transcript, p. 5, l. 2; information was that Chaney would be driver, p. 23, l. 8.

14. District Court Transcript, p. 39, l. 1.

14A. District Court Transcript, p. 15, l. 5—Sergeant Schwartzkoph stated "Well, I don't think we got into specifics."

to it a degree of credibility. It did not give information as to the route to be followed by the automobile.[15] It gave no information as to the purpose for which occupants were travelling across Michigan.[16] There was no information given as to the types of arms with which appellant and other occupants of the car "may be armed."[17] No information was given as to whether or not the occupants had either a Michigan or Indiana permit to carry arms in the automobile.[18]

In fact, the entire tip was indefinite and uncertain—"Appellant *may* be alone or there *may* be two others with him. Appellant *may* be armed as they *may* be carrying guns." There was not the certainty present in the information which would raise a presumption of credibility. From these facts it is readily apparent that this tip fails to measure up to the *Spinelli* rule. In fact, this tip fails in every respect to meet constitutional requirements as announced by this Court and is therefore unconstitutional.

The Court of Appeals of the State of Michigan attempts to salvage this search by basing its legality upon there being a stop and an arrest for speeding.[19] Not only does such a holding ignore the obvious facts and testimony in the case but it also is wholly erroneous.

Testimony of the Michigan state trooper who spotted the car was that he would not have stopped the car except for the radio bulletin,[20] and that he did not stop the car for speeding.[21] The prosecutor appearing for the State of Michigan informed the district court that this was not a case involving a stopping for a

15. District Court Transcript, p. 12, ll. 19-25; p. 6, l. 23 to p. 7, l. 2.

16. District Court Transcript, p. 16, l. 21 to p. 17, ll. 1-11.

17. District Court Transcript, p. 15, ll. 5-25.

18. District Court Transcript, p. 16, ll. 4-10.

19. Appendix B, p. A3.

20. District Court Transcript, p. 47, ll. 14-21.

21. District Court Transcript, p. 47, ll. 14-21.

traffic violation.[22] Further there was testimony that the officer spotting the car was ordered not to stop it alone, that he received aid from three other officers before stopping the car,[23] that the occupants of the car were ordered out of the car at shotgun point and exited with their hands up.[24] All of which refutes a stop-and-arrest merely for speeding. Further in actuality no speeding arrest was made, no speeding ticket was ever issued, and no one was charged or tried for exceeding the speed limit. In fact, this case gives support to Mr. Justice Marshall's statement in his dissenting opinion in the case of *United States* v. *Willie Robinson*[25] wherein he states:

> "There is always the possibility that a police officer lacking probable cause to obtain a search warrant will use a traffic arrest as a pretext to conduct a search."

This is precisely what occurred here. The officer, believing they needed an arrest to make the search and seizure proper, prepared a ticket for speeding and took occupants to their post in Ypsilanti. However, no ticket for speeding was ever issued, no speeding charges ever filed, nor was any occupant of the car ever tried by court for exceeding the speed limit.

From all of the above it becomes obvious that the search of appellant's automobile and the subsequent seizure pursuant to an informer's tip was totally unconstitutional. Therefor the judgment of the Michigan Supreme Court should be reversed.

REASONS WHY CERTIORARI SHOULD BE GRANTED.

The *Aguilar* decision setting forth the two-pronged rule for determining the validity of warrants and searches obtained and made on the basis of information supplied by an informer's tip was handed down in 1964. Since that time this Court issued

22. Disrict Court Transcript, p. 61, ll. 23-25.

23. District Court Transcript, p. 22, ll. 12-25.

24. District Court Transcript, p. 43, ll. 13-17; p. 44, ll. 9-10.

25. United States v. Willie Robinson, 38 L. Ed. 2d 427; 94 S. Ct. 494 (1973).

rulings in the *Spinelli* in 1968 and in the *Harris* in 1971 which indicate a tendency on the part of the Court to modify and relax the somewhat rigid rule of the *Aguilar* case by allowing the facts of the situation to supply both elements required under *Aguilar* and permitting the courts to judge the validity of such warrants and searches upon the facts and circumstances of each of such warrants or searches in the absence of the technical requirements of *Aguilar*. This apparent relaxation of the *Aguilar* holdings has created uncertainty in the courts as to just what is now the view of this Court upon validity of such searches and warrants made or issued as a result of an informer's tip. Hence courts, law enforcement officers, lawyers and magistrates now need a more definite and certain expression from this Court as to the rule to be followed in such searches and warrants. This need has been expressed by the Circuit Court of Appeals for the 8th Judicial Circuit in *United States* v. *Marihart*, 472 F. 2d 809:

> "*Harris* indicates an inclination to relax standards by which credibility of informers' tips are to be judged and avoid mechanical application of prophylactic rules such as the *Aguilar* test. It seems that in view of the concurring opinion of White in *Spinelli* and Blackman in *Harris*, in view of the marked difference in time between *Harris* and *Spinelli*, the span in voting patterns in those two cases, that the lower federal courts would be well served if the Supreme Court would clarify its view as to warrants and searches premised upon an informer's tip."

Further, in light of this Court's decisions in the recent cases of *United States* v. *Robinson*[26] and *Gustafson* v. *State of Florida*[27] which permit a full search of the person upon a custodial arrest for a traffic violation, this Court should here grant certiorari to determine whether or not the right of search upon a lawful arrest for a traffic offense extends to a search of the automobile. This is particularly necessary in light of Mr. Justice Powell's concurring opinion in the *Gustafson* which seems to state that upon

26. 38 L. Ed. 2d 427; 94 S. Ct. 494.

27. Gustafson v. State of Florida, 38 L. Ed. 2d 456; 94 S. Ct. 488 (1973).

a valid arrest for any reason, the arrestee loses his constitutionally guaranteed right to privacy. Under such reasoning it would seemingly follow that a search of the arrestee's automobile would be permissible upon a mere traffic arrest. This needs to be examined and determined anew in light of these new cases.

There is yet another reason why this Court should grant certiorari here. In *Robinson*, Mr. Justice Marshall in his dissenting opinion pointed out that some officers could well use a traffic arrest as a pretext for conducting a search of the person; Mr. Justice Stewart in his concurring opinion in *Gustafson* stated:

> "An arrest may not be used as a pretext for searching the arrestee";

and Mr. Justice Powell in his concurring opinion in *Gustafson* repeatedly used the terms "valid arrest" and "lawful arrest." It would therefore follow in light of these expressions that the arrest which permits a search of the person must be a valid, lawful arrest and not a mere pretext for the search.

Logically it would seem apparent then that there must be some finding that the traffic arrest was a valid, lawful arrest before evidence seized in the search would be admissible in evidence against the arrestee upon trial of other criminal charges.

CONCLUSION.

This Court should grant certiorari to set standards upon which to judge the validity of the arrest. It should determine when the ruling as to the validity of the arrest must be made. It must decide whether or not the guilt or innocence of the arrestee of the traffic offense has any material bearing upon the validity of the arrest and the search. It must decide what constitutes a custodial arrest and when such an arrest is made in a traffic violation situation.

These questions and others need now be answered by this Court in light of the holdings in *Robinson* and *Gustafson*

cases. Certiorari should be granted to determine answers to such questions for the guidance of inferior courts.

Respectfully submitted,

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APPENDIX A.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of November in the year of our Lord one thousand nine hundred and seventy three.

Present the HONORABLE THOMAS M. KAVANAGH, *Chief Justice;* THOMAS E. BRENNAN, THOMAS G. KAVANAGH, JOHN B. SWAINSON, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, *Associate Justices.*

CR 11-202

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

55062-3 vs.

WILLIAM M. CHANEY,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellant has failed to persuade the Court that the questions presented should be reviewed by this Court.

T. E. BRENNAN, *J.*, not participating.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of December in the year of our Lord one thousand nine hundred and seventy-three.

/s/ HAROLD HOAG,
Deputy Clerk.

APPENDIX B.

STATE OF MICHIGAN
IN THE COURT OF APPEALS DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

WILLIAM M. CHANEY,
Defendant-Appellant.

No. 14251-52

Before: QUINN, *PJ;* BRONSON and MICHAEL D. O'HARA, *JJ.*
PER CURIAM.

Convicted by a jury and sentenced for violation of MCLA 750.224; MSA 28.421 and MCLA 750.227; MSA 28.424, defendant appeals. The sole issue presented relates to the refusal of the lower courts to suppress evidence necessary for conviction seized in an alleged unlawful search.

Subsequent to being advised by his superior officer of an impending telephone call from an informant, state police sergeant Schwarzkopf received the call and the following information over the telephone from an allegedly reliable but confidential informant:

> "That a late model Chevrolet black over yellow with an Indiana license 98W-51 was traveling from, I believe, Hammond, Indiana area, and going to the Flint area. And that the driver, the person who would probably be driving the car would be a William Chaney. And that he may be alone, or there could be others with him. And that he may be harmed [sic] as they may be carrying guns."

After receiving this information, Sergeant Schwarzkopf advised his superior of the receipt of the call and of its contents. Decision was made to give this information to the state police operations office which broadcast it by radio. Officer Oesterling was patroling I-94 when he received the above information over the radio. Oesterling observed the above described vehicle and stopped it for speeding—80 mph in a 70 mph zone. The officer ascertained that the owner of the car was defendant Chaney, a passenger in the car. Thereupon the questioned search occurred and disclosed a semi-automatic pistol in a brown paper bag on the floor, a Kone Special .38 revolver in a brief case on the back seat, in the trunk a .38 snub-nose Smith and Wesson automatic revolver in a suitcase, a billy club in a brief case, a .30 caliber carbine rifle cased and unloaded, a can of Mace and boxes of ammunition.

The car was lawfully stopped, so the inquiry is was the search reasonable. *People* v. *Gonzales*, 356 Mich. 247, 253 (1959).

At the time of the search, officer Oesterling had verified all of the information that he had received over the radio, except for the presence of weapons. In this day of prevalent, indiscriminate use of handguns, was it unreasonable of him to ascertain whether or not the rest of the radio information was true? We think not. It would have been unreasonable for him not to have searched for the weapons.

AFFIRMED.